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REASONS FOR DENYING THE WRIT

Before responding to the arguments raised by the States, the Prisoners suggest that the pending petition for a writ of *certiorari* is moot. Supreme Court Rule 15.4. The Sixth Circuit held that § 1997e(a) was not retroactive to cases that were pending in the Court of Appeals on April 25, 1996, the date that the PLRA was enacted. *Wright v. Morris*, 111 F.3d 414 (6th Cir. 1997). The court also ruled against the prisoner-plaintiffs *on the merits* in three of the four cases, holding that the lower courts had properly granted summary judgment against, or properly dismissed, the Prisoners' complaints. Where the Court of Appeals has already affirmed the judgments against the plaintiffs on the merits, and where those judgments have not been appealed, the retroactivity of the administrative exhaustion provision of the PLRA is moot. That is, whether or not these prisoner-plaintiffs should have been required to exhaust their administrative remedies (retroactively), they cannot do so now since the Court of Appeals has entered a final judgment against them and no appeal has been taken by them from the adverse decision on the merits. In sum, there is no administrative remedy for the prisoner-plaintiffs to exhaust because the Sixth Circuit has entered a final appellate judgment against them on the merits, and no appeal has been taken.

In the fourth case, *Thaddeus-X and Bell v. Blatter*, 110 F.3d 1233 (6th Cir. 1997), the Sixth Circuit reversed on the merits and remanded the case. At this point the plaintiffs seek money damages. However, in Michigan, unlike some other states, there is no administrative complaint the plaintiffs could file, nor appeal they could pursue, which would allow them to recover money damages via a state administrative process. As a result, even if this Court were to grant *certiorari* and hold that the PLRA must be applied retroactively, the plaintiffs

would have no state administrative remedy to exhaust.[1]

The issue of retroactivity is moot as to the plaintiffs in the four consolidated cases. The claims of the plaintiffs in three cases are barred by final judgment, and, in the fourth case, only claims for damages are left to litigate, and as to those claims (or even injunctive claims) no administrative relief is possible. These consolidated cases were never certified as a class action. The plaintiffs' claims in all four cases are now moot as far as the retroactivity of the exhaustion provision of the PLRA is concerned.

I. CONGRESS ITSELF LIMITED APPLICATION OF THE PLRA'S STATE-EXHAUSTION REQUIREMENTS TO CASES BROUGHT AFTER ITS EFFECTIVE DATE.

The question decided by the Sixth Circuit was whether the PLRA's exhaustion requirement applied to cases already filed on the date of its enactment. The Sixth Circuit answered this question by resorting to accepted canons of statutory construction, beginning with the plain language of the PLRA. The language of Section 1997e(a) itself compels prospective application:

> No action shall be brought with respect to prison conditions under [Section 1983], by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted.

The key language of the statute is "shall be brought." That language anticipates future action, that is, action taking place after the enactment of the statute. Had Congress intended a different meaning, it could have used language which expressly indicated a retroactive effect. This interpretation is bolstered by analysis of the other sections of the statute. In fact, only one of ten sections of the

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[1] To the extent that the prisoner-plaintiffs originally sought injunctive relief to stop the defendants from retaliating against them, the Court should note that the defendants' actions occurred in May and June of *1994*. There is no longer any realistic likelihood that the problems are continuing to this day. Indeed, three years after the fact, an administrative hearing could not provide any meaningful remedy whatever.

PLRA provides specifically for retroactive application of the law. Section 802(b)(1) provides:

> Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.

By this special provision, Congress demonstrated that where it intended retroactivity within the PLRA, it clearly specified it. Since nine sections make no mention whatsoever of any retroactivity, the logical conclusion is that Congress intended those sections to be applied prospectively. If Congress had failed to designate § 802(b)(1) as retroactive, that Section would also have been concluded to be prospective.

II. THE SIXTH CIRCUIT CORRECTLY HELD THAT LANDGRAF V. U.S.I. FILM PRODUCTS BARS RETROACTIVE APPLICATION OF THE PLRA

The States contend that the Sixth Circuit erred in applying *Landgraf v. U.S.I. Film Products*, 511 U.S. 244 (1994). According to the States, the rules of interpretation set out in *Landgraf* require that the PLRA be applied to cases pending at the time of its enactment. A close reading of *Landgraf* reveals the accuracy of the Sixth Circuit's analysis.

A. The Sixth Circuit properly applied Landgraf

In *Landgraf*, this Court considered the retroactive application of amendments to the Civil Rights Act of 1991. This Court reiterated a bedrock principle that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 265, citing, *Bradley v. Richmond*, 416 U.S. 696, 711; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 206. As in this case, the provisions considered in *Landgraf* were silent on retroactivity. This Court noted that it traditionally refused to give retroactive effect to a statute unless "clear, strong, and

imperative" language "so clear and positive as to leave no room [for] doubt that such was the intention of the legislature" required the result. *Id.* at 270, 272.

The *Landgraf* Court once and for all explained the procedure for retroactivity review. "If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.* This analytical framework developed through a series of cases culminating in *Landgraf*. *Landgraf* provided the federal courts with one clear and precise guide for deciding retroactivity cases rather than requiring lower courts and parties to search and dissect a group of cases to determine which among them applied.

After *Landgraf*, there is only one analytical framework for the lower courts, and the Sixth Circuit applied it in this case to reach the correct result. Therefore, the States' reliance on *Weinberger v. Salfi*, 422 U.S. 749 (1975), a decision which predates *Landgraf* by twenty years, is misplaced. The Sixth Circuit properly applied the *Landgraf* framework to reach the correct result.

B. The Sixth Circuit's analysis and conclusion does not conflict with decisions from other Circuits.

The States suggest that the Sixth Circuit's decision conflicts with decisions from other courts holding the PLRA's exhaustion requirement to be jurisdictional. In fact, there is no Circuit split.

First, the States rely on the Ninth Circuit's remand of cases to comply with administrative exhaustion. Contrary to the States' assertion, the Ninth Circuit has not ordered that § 1997(e) be applied retroactively. In *Berry v. Gomez*, 108 F.3d 336 (9th Cir. 1997) (Table), 1997 U.S. App. LEXIS 3234, 1997 W.L. 75578, the Court remanded the case and instructed that on remand the district court should consider the effect of the PLRA, particularly the exhaustion requirement. The

Ninth Circuit did not require the exhaustion of administrative remedies in a case filed before the enactment of the PLRA; it merely required the district court to determine whether the enactment had any effect on the case. Likewise in *St. Hilaire v. Arizona*, 87 F.3d 1321 (9th Cir. 1996) (Table), 1996 U.S. App. LEXIS 16778, 1996 W.L. 341280, the Ninth Circuit merely stated that on remand, the issue of exhaustion should be revisited, particularly in light of the amendments to § 1997e which may be applicable. That court did not decide whether the exhaustion provision would apply retroactively; it merely instructed the district court to consider whether the PLRA had any applicability to the case. Moreover, in *St. Hilaire*, the exhaustion had originally arisen under the pre-PLRA version of § 1997e which allowed a district court to stay an action pending exhaustion under certain circumstances.[2]

Second, the cases[3] the States cite for the proposition that other courts have found PLRA's administrative exhaustion provision to be jurisdictional are all unpublished district court opinions on motions to dismiss which address the jurisdictional nature of exhaustion in passing, citing only to a case which finds a different statute's exhaustion provision to be jurisdictional. Conversely, the Sixth Circuit opinion in this case goes to great lengths to analyze correctly the non-jurisdictional nature of the specific exhaustion provision at issue in this case, indeed to contrast the language of the PLRA to that of other statutes which have been found to be jurisdictional.

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[2] Importantly, too, both opinions of the Ninth Circuit to which petitioners cite are unreported decisions, which according to the Ninth Circuit itself may not be cited to, or by, the courts of that circuit except as provided by Ninth Circuit Rule 36-3. Consequently, neither carries any precedential value, even in its own Circuit.

[3] *Bell v. Calderon*, No. C96-4398 SI, 1997 U.S. Dist. LEXIS 4373, 1997 W.L. 168564 (N.D. Cal. Apr. 1, 1997); *Eakins v. Madrid*, No. C 96-2229 SI, 1996 U.S. Dist. LEXIS 19150, 1996 W.L. 743812 (N.D. Cal. Dec. 17, 1996); and *Hernandez v. Steward*, No. 96-3222-SAC, 1996 U.S. Dist. LEXIS 18076, 1996 W.L. 707015 (D. Kan. Nov. 27, 1996).

Finally, the States contend that the Sixth Circuit's decision in this case is at odds with decisions of other circuits discussing other sections of the PLRA. The cases cited by the States all deal with sections of the PLRA which amend 28 U.S.C. 1915, governing the *in forma pauperis* provisions. None of the changes made by the PLRA to that statute would prohibit an inmate from bringing an action; they only change his or her ability to file as a pauper.

In deciding that such changes were procedural in nature, and thus could be applied retroactively, the courts noted that the inmates were not being deprived of the right to file a lawsuit. *See Adepabda v. Hammons*, 103 F.3d 383, 386 (5th Cir. 1996) (§ 1915(g) does not affect a prisoner's substantive rights and does not block the prisoner's access to the courts); *Covino v. Reopel*, 89 F.3d 105, 108 (2d Cir. 1996) (already filed complaint might well prevent retroactive application of new complaint rules where their application risked dismissal and a resulting time bar to plaintiff's cause of action, or even if dismissal was ordered without prejudice, risked the waste of significant time and effort by plaintiff in investigating the facts of the case and framing the complaint under the prior rules).

The *Covino* court specifically stated that a statute should not be applied retroactively if that application might result in dismissal of a pending action and erect a subsequent time bar to its refiling. The Sixth Circuit specifically addressed this issue and held that the exhaustion provision should not be applied retroactively precisely because of the risk of such dismissal.

Remanding these cases for exhaustion would also cause unnecessary future jurisprudential questions. The events giving rise to these cases occurred several years ago; in some, the statute of limitations has expired. Although all four of the states' representatives stated at oral argument that they would waive any applicable time limits on filing administrative claims, none could offer

satisfactory assurance that they had the authority to extend the applicable statutes of limitations. Were the Court to apply the new law to these cases, it is not completely certain that the statutes of limitations would be tolled. *Wright*, 111 F.3d at 422-23.

The Sixth Circuit's decision is the first to directly address this issue. The well reasoned opinion thoroughly discussed the applicable law. There is no reason to believe that the other circuits will not follow this decision as they confront this issue. However, because this is a case of first impression in the other circuits, it is too early to determine that this view will be adopted by the other circuits. This Court should not address this issue until more than one circuit has had an opportunity to consider this issue. *See* Supreme Court Rule 10(a).

C. The PLRA is distinguishable from the FTCA; comparisons between the two provisions are inappropriate.

The States assert that the administrative exhaustion provision of the PLRA should be applied retroactively because the Federal Tort Claims Act (FTCA) which has almost identical language has been applied retroactively and the exhaustion provision of that statute has been determined to be jurisdictional. (Petition for Writ of Certiorari at 14-15).

The FTCA was originally enacted on August 2, 1946. At that time, the statutory provisions were expressly made retroactive to all claims accruing on or after January 1, 1945. Congress thus specified that the statute was to be retroactive. When 28 U.S.C. 2675(a) was approved on July 18, 1966, as an amendment to the FTCA, it was expressly made prospective as to all claims "accruing six months or more after the date of enactment." None of the cases listed by the States was pending at the time of either the passage of the original

FTCA or the approval of the 1966 amendment.[4]

The only point established by the cases cited by the States is that circuit courts consistently decline to rule on any action under the FTCA until all administrative remedies have been exhausted, as required by the statute. However, given the specific language in both the original FTCA and its amendment denominating the time frame for application of the provisions, any suggestion that the FTCA necessitates retroactive application of PLRA is misplaced. Quite simply, the unique nature of the FTCA, and the amendment, make it inapplicable to the PLRA

III. CONGRESS CANNOT HAVE INTENDED THAT THE EXHAUSTION PROVISION OF THE PLRA BE APPLIED RETROACTIVELY BECAUSE TO DO SO WOULD DISRUPT TWO LEVELS OF FEDERAL COURT DOCKETS AND ADMINISTRATIVE AGENCIES IN ALL 50 STATES.

Section 803 of the PLRA amended the administrative exhaustion requirement 42 U.S.C. § 1997e. The former provision stated that a district court "*shall*, if the court believes that such a requirement would be appropriate and in the interests of justice, . . . continue [a prisoner's rights] case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available." *Id.*[5]

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[4] *McNeil v. United States*, 508 U.S. 106 (1993)(suit filed on March 6, 1989); *Bowden v. United States*, 106 F.3d 433 (D.C. Cir. 1997) (suit filed October, 1992); *Cotto v. United States*, 993 F.2d 274 (1st Cir. 1993) (suit filed February 24, 1989); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502 (2d Cir. 1994); (suit filed December 21. 1992); *Livera v. First Nat'l State Bank*, 879 F.2d 1186 (3d Cir.), *cert. denied sub. nom, Livera v. United States Small Bus. Admin.*, 493 U.S. 937 (1989)(litigation commenced in 1981); *Ahmed v. United States*, 30 F.3d 514 (4th Cir. 1994)(suit filed June 23, 1992); *Price v. United States*, 81 F.3d 520 (5th Cir.), *cert. denied*, 117 S. Ct. 295 (1996)(suit filed August 9, 1983); *Ezekiel v. Michel*, 66 F.3d 894 (7th Cir. 1995)(suit filed after November 1993); *Wilson v. Drake*, 87 F.3d 1073 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1311 (1997)(suit filed in June 1993); *Kendall v. Watkins*, 998 F.2d 848 (10th Cir. 1993), *cert. denied*, 510 U.S. 1120 (1994)(suit filed in June 1990).

[5] Section 2 of the former law required exhaustion of administrative remedies when the United States Attorney General certified, or the district court determined, that such remedies were in substantial compliance with the minimum acceptable standards laid out under subsections (b)-

Thus, under the *old* law, administrative exhaustion was clearly mandatory in every case in which it would be effective. The district court had both the authority and the duty to issue a stay and remand the case for state administrative review (1) where appropriate, (2) where justice would be served, and (3) where the review process substantially equaled federal guidelines or was "otherwise fair and effective." In other words, *every* case pending in the Sixth Circuit on May 25, 1996, should already have been subjected to the state administrative process if the case had any realistic chance of being resolved by that process.

The one dependable rule in exhaustion cases is that a plaintiff need not exhaust a remedy that would be futile. *See Clayton v. U.A.W.*, 451 U.S. 679 (1981). Both as a matter of court administration and public policy, it makes no sense to remand some 500 cases so that they can be sent back to state administrative agencies for a futile administrative process.

The *Thaddeus-X and Bell* case is illustrative. The prisoner-plaintiffs seek money damages for alleged retaliation by prison guards (which occurred three years ago, in the spring of 1994).[6] Michigan's administrative remedies do not permit the recovery of money by prisoners. If the case were remanded to the Michigan Department of Corrections, there is literally nothing that the MDOC could do for them. *See also*, *Prunty v. Branson*, 7 F.3d 234 (6th Cir. 1993) (Table), 1993 W.L. 328037 (abuse of discretion for district court to stay action

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(d) of the law "or were otherwise fair and effective." *Id.* Although 42 U.S.C. § 1997e was passed in 1980, many states never sought certification or delayed it for years. According to United States Department of Justice data, Ohio's procedures were certified on September 11, 1987, and Tennessee's were certified on May 26, 1993, before the respective complaints in these actions filed. Michigan's procedures were certified on April 18, 1995, some nine months after Thaddeus-X and Bell filed their complaint. However, there is no indication that Michigan's procedures before April, 1995, were not "otherwise fair and effective." *See Hadix v. Johnson*, 977 F.2d 996 (6th Cir. 1992). Kentucky's procedures were never certified before certification was rescinded in 1996 by the passage.

[6] The misconduct they complained of is now long over, so that there is no meaningful

under § 1997e where prisoner plaintiff sued only for money and Ohio's administrative procedures barred recovery of money).

Furthermore, as the Sixth Circuit noted, in most cases the administrative process would now be time-barred. *Wright*, 111 F.3d at 422. And if Judge Merritt's dissent were right - that the exhaustion requirement is jurisdictional - then the court could not even grant a stay, but would have to dismiss all 500 cases outright, which in turn would raise statute of limitations problems when the inmates re-filed in federal court after "exhausting" the state administrative process. *Id.* at 425 (Merritt, J., dissenting). The Sixth Circuit's decision is sensible if it avoids the prospect of remanding hundreds of cases for futile administrative review, only to have most of them return to the Court of Appeals again after having clogged the dockets of the district courts a second time as well.

Section 803 is problematic for pending cases because it makes administrative exhaustion a prerequisite to filing a federal court action, instead of being grounds for a stay, and it requires exhaustion of "such administrative remedies as are available" without any apparent regard to their appropriateness or efficacy. *See* 42 U.S.C. 1997e(a). Just processing the cases would take hours of staff time for the judicial and executive agencies. The cases could be delayed for years while prisoners re-file grievances and await hearings and administrative appeals, only to be told in the end that their claims are not grievable or are time-barred. To remand all cases for exhaustion now - simply because the PLRA makes exhaustion a *filing* requirement - is to countenance an absurd result.

Given this scenario - which Congress must have recognized - and absent any Congressional intent to the contrary, the exhaustion requirement of § 803 of

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"injunctive" administrative relief that could be granted either.

the PLRA (amending 42 U.S.C. § 1997e) cannot have been intended to apply retroactively to cases filed before the date of the PLRA's enactment.

CONCLUSION

For the foregoing reasons, this Court should not grant the Petition for Writ of Certiorari.

Respectfully submitted,

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